



C.R.P.No.991 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on 13.04.2023

Delivered on 01.12.2023

CORAM:

The Hon'ble MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

C.R.P.No.991 of 2021
and C.M.P.No.7964 of 2021

R.T.Investments & Real Estate
Rep. by its Proprietor Ramadoss,
S/o.Subramani,
No.9/1, Pudu Street,
Sankaranpalayam,
Vellore – 632 001.

...Petitioner/Petitioner/11th Defendant

-Vs-

Ramakrishnan

...Respondent/Respondent/Plaintiff

Prayer:-Civil Revision Petition filed under Section 115 of CPC, against the fair and decreetal order dated 29.09.2020 made in I.A.No.2 of 2019 in O.S.No.61 of 2004 on the file of the learned Additional Subordinate Judge, Vellore District.

For Petitioner : Mr.T.Rajaraman
For Respondent : Mr.C.Prabakaran

ORDER

This Civil Revision Petition is filed to set aside the fair and decreetal order dated 29.09.2020 made in I.A.No.2 of 2019 in O.S.No.61



C.R.P.No.991 of 2021

of 2004 on the file of the learned Additional Subordinate Judge, Vellore District.

2.The learned Counsel for the Revision Petitioner would submit that the Petitioner is the 11th Defendant in O.S.No.61 of 2004. It is submitted that the 11th Defendant was set *ex parte*. Further, on the date of passing of the preliminary decree for partition, the 10th Defendant had already died. Therefore, the suit abated as against the 10th Defendant. The 11th Defendant filed Petition to set aside the *ex parte* decree, which was dismissed by the learned Trial Judge. He also submits that under what circumstances the learned Trial Judge arrived at the preliminary decree needs re-consideration.

3.The learned Counsel for the Revision Petitioner invited the attention of this Court and relied on the following rulings:-

(a) In the case of ***Annapoorni Vs. Janaki*** reported in ***1995 (1) LW 141***, wherein this Court has held as follows:

“Civil Procedure Code, Section 115, (as amended by Act 104 of 1976) and Section 47 and Constitution of India, Article 227 – Scope of High Court's powers of interference –



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C.R.P.No.991 of 2021

Objection to execution of decree on the ground that decree is unsustainable in law and as such could not be executed, upheld, in exercise of High Court's powers under Section 115 of C.P.C and Article 227.

Error in applying provisions of Hindu Succession Act to the case – Even if there is no plea by Defendant, Court is bound to respect the provisions of law and apply the same correctly.

Availability of appeal as a bar to exercise of power under Section 115(2) – Effect of 1976 Amendment – Suo moto power, exercise of, under Section 115, not restricted by provisions of sub-section (2).

Power of superintendence under Article 227 is not only administrative, but also judicial.

Decree declaring wife of a deceased Hindu as his sole heir, ignoring the right of his mother as a co heir – illegality, rectification of, by High Court in execution proceedings in exercise of its powers of revision – permissibility.

C.P.C, Section 47 – See Section 115 and Constitution of India, Article 227.

Constitution of India, Article 227 – See C.P.C., Section 115 and Section 47, etc.”

(b) In the case of ***Sekar and others Vs. Poongavanathammal and others*** reported in **2014 (5) CTC 832**, wherein this Court has held as follows:

“Code of Civil Procedure, 1908 (5 of 1908), Section 2(11), Order 22, Rules 2, 3, 4, 5 & 9 – Partition Suit – Final Decree proceedings – Second Appeal before High Court –



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C.R.P.No.991 of 2021

Preliminary objection that Second Appeal is not maintainable, since 11th Respondent died even before judgment was passed by First Appellate Court and that her legal representative was not brought on record – When Appellant/Respondent in Appeal dies and right to sue survives, Legal Representatives of deceased Appellant/Respondent have to be brought on record, before Court proceeds further – Court cannot postpone decision, as to who are Legal Representatives of deceased Appellant/Respondent, to be decided along with Appeal – If Legal Representatives are not brought on record, Appeal automatically abates and Appellate Court cannot modify decree, directly or indirectly – Appeal against dead person is nullity - 11th Respondent died on 14.07.2004 and judgment in Appeal was rendered on 24.01.2007 – Whether husband of 11th Respondent, who allegedly murdered her, is disqualified from inheriting property of 11th Respondent, can be decided only after he is brought on record – Non-impleadment of Legal Representatives of deceased 11th Respondent is fatal to case of Appellants – Lack of diligence and negligence attributed to Appellants – Since Legal Representatives of 11th Respondent were not brought on record, judgment of Lower Appellate Court is nullity and inoperative – Impugned judgment set aside – Matter remitted – Second Appeal disposed off.”

(c) In the case of **Gurnam Singh (Dead) through legal representatives and Others Vs. Gurbachan Kaur (Dead) by legal representatives** reported in **(2017) 13 SCC 414**, wherein the Hon'ble Supreme Court



C.R.P.No.991 of 2021

has held as follows:

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“Civil Procedure Code, 1908 – Order 22 Rule 3 & 4 and 9 – Failure to bring Lrs of dead parties on record within stipulated time – Effect of – When Lrs of deceased litigant not brought on record withing 90 days, then such proceedings stand abated – Any decision in favour of and/or against dead person renders such decision nullity – Such decrees, being nullity, can be challenged at any time whenever they are sought to be enforced – Method of reviving matter once it stands abated, explained.”

4.The learned Counsel for the Respondent vehemently objected to the lines of argument of the learned Counsel for the Revision Petitioner, stating that the order passed by the learned Additional Subordinate Judge, Vellore District, dismissing the Petition in I.A.No.2 of 2019 in O.S.No.61 of 2004, to condone the delay of 650 days in filing the Petition under Order IX Rule 13 of CPC to set aside the *ex parte* decree passed by the learned Additional Subordinate Judge, Vellore District, dated 15.11.2017 is a well-reasoned order that does not warrant any interference by this Court.

5.It is stated by the learned Counsel for the Respondent that the Petitioner is the 11th Defendant in the suit. He is a real estate dealer. As



C.R.P.No.991 of 2021

such, he does not have any share in the joint family property. The Plaintiff had filed the suit against Defendants 1 to 17. Originally, Defendants 1 to 10 were family members of the Plaintiff. He had sought a preliminary decree of partition of his 1/5th share. As per the plaint averments, the Plaintiff had come to know that Defendants 1 to 10 had attempted to encumber the properties and also encumbered a few other properties. Therefore, he had impleaded Defendants 11 to 17 as parties to the suit for partition.

6.It is to be noted that the learned Additional Subordinate Judge, Vellore District, had considered the vehement objection of the Plaintiff in the counter to the Petition in I.A.No.2 of 2019, stating that when P.W.1 was in the witness box and when the case was posted for cross-examination, the learned Counsel appearing for the 11th Defendant reported 'no instructions' for the 11th Defendant and made endorsement on the Vakalat. The same Counsel had filed Petition to condone the delay of 650 days in filing the Petition to set aside the *ex parte* decree, which was objected to by the Plaintiff as Petitioner in the final decree application and served notice on the 11th Defendant as Respondent in the final decree



C.R.P.No.991 of 2021

WEB COPY

application. The final decree application was I.A.No.680 of 2018. Notice was issued to the 11th Defendant on 27.07.2018. Still belatedly, the 11th Defendant filed the Petition as though he did not have knowledge of the passing of the preliminary decree, seeking to condone the delay of 650 days in filing the Petition to set aside the *ex parte* decree. Further in the counter, the Plaintiff as Respondent in I.A.No.2 of 2019 in O.S.No.61 of 2004 stated that after the learned Counsel appearing for the 11th Defendant made endorsement on the Vakalat reporting 'no instructions', on 21.04.2015, the Court had sent notice to the 11th Defendant. The notice was also served on the 11th Defendant. On 15.11.2017, there was no representation for the 11th Defendant after service of notice. Therefore, on 15.11.2017, the *ex parte* decree was passed in favour of the Plaintiff. Even after notice was served in the final decree in I.A.No.618 of 2018 on 27.07.2018 on this Petition. The Petitioner had not approached the Court within a reasonable time; he belatedly filed the Petition after one year. On 26.09.2019 only with an intention to delay the passing of the final decree. Therefore, the learned Counsel for the Respondent/Plaintiff vehemently objected to the same. The only reason stated by the Petitioner is that he was ill due to Jaundice and could not attend Court on the date of his



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having been set *ex parte*.

7.The learned Additional Subordinate Judge, Vellore District, had observed all these facts in his order and relied on the rulings:

- (a) In the case of ***Ranganatha Iyyangar Vs. Thangarasan*** reported in ***2008 (5) CTC 628***.
- (b) In the case of ***Sankaralingam Vs. Raghuraman*** reported in ***2002 Vol 3 CTC page 13***.

8.The learned Trial Judge had further observed that the Petitioner had not properly explained the delay and that no materials had been placed before the Court regarding the explanation offered by the Petitioner, which is as follows:

“11.It is well settled that the delay of justice is equal amount of denial of justice added further this Court wants to emphasize the following legal maxims jus ex injuria non oritur i.e. A right does not arise out of a wrong and nullus commodum capere potest de injuria sua propria i.e. No man can take advantage of his own wrong.

12.From the conglomeration of the above said analyzation, it has been held that the Petitioner has not convinced in mora of 650 days to filing an application under Order IX, Rule 13 of CPC.”

it does not warrant any interference by this Court. The Petitioner had



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engaged the very same Counsel to file this Petition, the Counsel who reported 'no instructions'.

9. In support of his contention, the learned Counsel for the Respondent relied on the following rulings:-

(a) In the case of ***H.Dohil Constructions Company Private Limited Vs.***

Nahar Exports Limited and Another reported in ***(2015) 1 SCC 680***,

wherein the Hon'ble Supreme Court has held as follows:

“Civil Procedure Code, 1908 – Order 41 Rule 3-A and Section 96 – Inordinate delay in refiling Appeal before High Court – Application for condonation of delay – Lack of bona fides and gross negligence on part of Appellants (before High Court, present Respondents) – Consequent prejudice to Respondents (before High Court, present Appellants) – Scale of balance of justice required to be weighed in respect of both parties even if delay pertains to refiling of Appeal – Stringent scrutiny of Appellant's explanation needed to determine sufficiency of cause of such delay.”

“23. We may also usefully refer to the recent decision of this Court in Esha Bhattacharjee [Esha Bhattacharjee v. Raghunathpur Nafar Academy, (2013) 12 SCC 649 : (2014) 1 SCC (Civ) 713 : (2014) 4 SCC (Cri) 450 : (2014) 2 SCC (L&S) 595] where several principles were culled out to be kept in mind while dealing with such applications for condonation of delay. Principles (iv), (v), (viii), (ix) and (x) of para 21 can be usefully referred to, which read as under : (SCC pp. 658-59)



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“21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go-by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.”

(b) In the case of *M/s.TDI International India (P) Ltd. Vs. The Regional Executive Director and Another* reported in 2019 (1)

***TNCJ 772 (MAD) (MB)*, wherein this Court has held as follows:**

“(A) Limitation Act, 1963 – Section 5 – Delay – condonation of 75 days 'Sufficient cause' condition precedent for exercise of judicial discretion – Delay not to be condoned purely on sympathetic ground – If litigant not bona fide one and is thoroughly negligent



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in prosecuting case, delay cannot be condoned.

(B) Civil Procedure Code, 1908 – Section 114 – Review – Scope of – Review of an order cannot be acceded to under cover of 'clarification' – Review has a restricted purpose and cannot be permitted to act as an Appeal.”

(c) In the case of ***Ramamoorthy and Others Vs. Rajaiyan and Another*** reported in ***2019 (1) TNCJ 992 (MAD) (MB)***, wherein this Court has held as follows:

“Limitation Act, 1963 – Section 5 – Civil Procedure Code, 1908 – Section 115 – Condonation of delay – Impleadment of – Delay of 1280 days – Suffering from jaundice was reason – Reason not properly explained – Court below dismissed application for not explaining delay – No illegality – Petition dismissed.”

(d) In the case of ***Arunachalam Vs. Vijayakumar and Another*** reported in ***2019 (1) TNCJ 475 (MAD) (MB)***, wherein this Court has held as follows:

“Limitation Act, 1963 – Section 5 – Suit for reliefs of declaration and permanent injunction – Ex parte decree – Delay of 332 days for preferring application to set aside ex parte decree – Since Court granted sufficient opportunity to Revision Petitioner to adduce evidence in support of their case, but they remained absent resultantly Court set them ex parte – Reasons given by Petitioner for such huge delay not sufficiently explained – Conduct of Revision Petitioner expose that present application is only to



C.R.P.No.991 of 2021

cause hardship and inconvenience to 1st Respondent – No sufficient cause put forth by Revision Petitioner as contemplated under Section 5 of Limitation Act – Court below rightly dismissed application for condonation of delay – No interference is called for.”

(e) In the case of ***The Government of Tamil Nadu and Others Vs.***

V.P.Paulsamy (D) through Lrs and another reported in 2020 (3)

TNCJ 116 (MAD) (MB), wherein this Court has held as follows:

“Limitation Act, 1963 – Section 5 – Condonation of delay – Petition for condonation of delay 2177 days in filing Appeal – And prayer for issuance of a writ of certiorarified mandamus, to quash proceedings of 3rd Appellant / 3rd Respondent – It is contended from side of Petitioners that the returned paper of Appeal originally filed, got mingled with other papers and therefore fresh Writ Appeal came to be filed – Since delay is nearly six years odd the Writ Petitioner also left for heavenly abode and his legal representatives are defending the proceedings – Held, delay is huge and enormous and no proper, acceptable and tenable reasons have been adduced – Therefore, delay cannot be condoned – Petition as well as W.A. Dismissed.”

10. Point for consideration:-

Whether the order passed by the learned Additional Subordinate Judge, Vellore District, dismissing the Petition in I.A.No.2 of 2019 in O.S.No.61 of 2004 dated 29.09.2020 is to be set aside?



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11. On consideration of the rival submissions, the rulings relied on by the learned Counsel for the Revision Petitioner

(a) in the case of *Annapoorni Vs. Janaki* reported in **1995 (1) LW 141**.

(b) in the case of *Sekar and others Vs. Poongavanathammal and others* reported in **2014 (5) CTC 832**.

(c) in the case of *Gurnam Singh (Dead) through legal representatives and Others Vs. Gurbachan Kaur (Dead) by legal representatives* reported in **(2017) 13 SCC 414**

are not helpful to this case. The rulings are with regard to the legal representatives of the deceased Defendant not brought on record. Therefore, the judgment is to be set aside. Here, the 11th Respondent had filed Petition to condone the delay of 650 days, but no proper explanation was offered. Also, by filing a final decree, notice was served on the 11th Defendant. Still, he did not appear before the Court. Also, the learned Counsel who represented the 11th Defendant in the Trial Court had reported 'no instructions'. Therefore, the Court had issued notice to the 11th Defendant. Even after service of notice, he did not appear on 15.11.2017, on which date the *ex parte* decree was passed. The explanation offered by



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the Petitioner states that he was ill due to Jaundice, and no medical records are furnished by them. The claim of Jaundice is to evade filing medical documents so that the parties can claim that they are taking native treatment. The learned Trial Judge had arrived at the conclusion that the explanation offered by the 11th Defendant as Petitioner in I.A.No.2 of 2019 in O.S.No.61 of 2004 was not *bona fide* as he had not appeared before the Court after issuance of notice by the Court, after the learned Counsel for the 11th Defendant reported no instructions for the 11th Defendant. At the stage of cross-examination of P.W.1, the notice sent by the Court to the 11th Defendant, still did not appear before the Court. Subsequently, the Plaintiff had filed Petition for a final decree in I.A.No.680 of 2018. The 11th Defendant did not appear before the Court. Under those circumstances, the Trial Court had arrived at the conclusion that there were no *bona fide* reasons stated by the Petitioner for the delay of 650 days in filing the Petition to set aside the *ex parte* decree.

12.The rulings cited above by the learned Counsel for the Revision Petitioner are not supportive to the facts of the Petitioner's case. The preliminary decree passed on the date of passing of the preliminary decree,



whether it was passed against the person who was already dead and whose legal representatives were not brought on record, or before this Court by filing of a Petition by the legal representatives of the 10th Defendant. The Petitioner herein, the 11th Defendant is a real estate dealer and he cannot take such a plea before this Court seeking to set aside the judgment and decree passed by the learned Trial Judge after assessing the evidence available before this Court. If any of the Defendants, who have a claim over the share of the properties are prejudiced by the fact that the preliminary decree passed by the Trial Court was passed against the deceased person without impleading the legal representatives, it is for those persons whose valuable rights are affected and not for this 11th Defendant. Therefore, the said contention and the rulings cited by the learned Counsel for the 11th Defendant are rejected.

13.The rulings cited by the learned Counsel for the Respondent are as follows:-

- (a) In the case of ***H.Dohil Constructions Company Private Limited Vs. Nahar Exports Limited and Another*** reported in ***(2015) 1 SCC 680***.
- (b) In the case of ***M/s.TDI International India (P) Ltd. Vs. The***



C.R.P.No.991 of 2021

WEB COPY

Regional Executive Director and Another reported in **2019 (1) TNCJ 772 (MAD) (MB)**.

(c) In the case of ***Ramamoorthy and Others Vs. Rajaiyan and Another*** reported in **2019 (1) TNCJ 992 (MAD) (MB)**

(d) In the case of ***Arunachalam Vs. Vijayakumar and Another*** reported in **2019 (1) TNCJ 475 (MAD) (MB)**

(e) In the case of ***The Government of Tamil Nadu and Others Vs. V.P.Paulsamy (D) through Lrs and another*** reported in **2020 (3) TNCJ 116 (MAD) (MB)**

are found applicable to the facts of this case. In all the above rulings, it is stated that the party who was not indulgent and who filed the Petition belatedly without *bona fide* reasons has to be rejected.

14. The learned Additional Subordinate Judge, Vellore District, in his order had clearly stated that there is no *bona fide* on the part of the Petitioner as he was not indulgent. The Court cannot help those who sleep over their rights by observing the said legal principle. The learned Additional Subordinate Judge, Vellore District, had rejected the said Petition seeking condonation of the delay of 650 days in filing the Petition



C.R.P.No.991 of 2021

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to set aside the *ex parte* decree.

15.In the light of the above discussion, this Court finds no merit in this Civil Revision Petition.

16.The point for consideration is answered against the Revision Petitioner and in favour of the Respondent/Plaintiff.

17.In the result, this **Civil Revision Petition stands dismissed**, the order passed by the learned Additional Subordinate Judge, Vellore District, dismissing the Petition in I.A.No.2 of 2019 in O.S.No.61 of 2004 dated 29.09.2020 is confirmed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

01.12.2023

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Index : Yes/No

Speaking/Non-speaking order

Neutral Citation : Yes/No



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C.R.P.No.991 of 2021

SATHI KUMAR SUKUMARA KURUP, J.,

cda

To

The Additional Subordinate Judge, Vellore District.

**Order made in
C.R.P.No.991 of 2021**



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C.R.P.No.991 of 2021

01.12.2023